No. 46866-2-II

Pierce County #13-1-03205-0

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

STEPHANE PERRY,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Philip K. Sorenson, Judge

APPELLANT'S OPENING BRIEF

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1. Appellant Stephane Perry was deprived of his Fifth Amendment and Article 1, § 9 rights to be free from double jeopardy when he was convicted of both second- and third-degree possession of stolen property based on different items all found at the same time in the same room.

2. The prosecution failed to present sufficient evidence to prove the essential "value" element of possession of stolen property and the resulting conviction must be reversed and dismissed with prejudice.

3. Perry was deprived of his Sixth Amendment and Article 1, § 22, rights to effective assistance of appointed counsel when trial counsel failed to propose a cautionary instruction on how to treat the testimony of an accomplice.

4. Mr. Perry's Article 1, § 21 right to an unanimous jury was violated when the prosecution assumed the burden of proving multiple alternative means for committing the crimes of identity theft and criminal trespass but failed to provide sufficient evidence to prove all of those means and the errors are not harmless.

5. The charging document was constitutionally insufficient for the third-degree possession of stolen property and possession of a stolen vehicle convictions.

6. The sentencing court erred in ordering forfeiture of property without statutory authority and in violation of RCW 9.92.110. This Court's decision in State v. Roberts, 185 Wn. App. 94, 339 P.3d 995 (2014), controls.

7. Appellant assigns error to the "boilerplate," pre-printed finding 2.5, which provides:

> **ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.** The court has considered the total amount owing, the defendant's part, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 261.

8. The trial court erred in failing to conduct the required inquiry into Mr. Perry's individual financial circumstances and his likely ability to pay prior to imposing legal financial obligations and this Court should exercise its discretion to address the issue under State v. Blazina, 182 Wn.2d 827, 832, 344 P.3d 680 (2015)

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The crime of possession of stolen property has a unit of prosecution of a single possession or other *actus reus*, even if there are multiple items from different alleged victims involved.

   Were Mr. Perry's rights to be free from double jeopardy violated when he was convicted of both second- and third-degree possession of stolen property for possession of multiple items at the same time in the same place?

2. To prove all the essential elements of second-degree possession of stolen property, the prosecution was required to show that the items possessed had a value of at least $750 dollars and less than $5,000.

   Did the prosecution fail to meet its burden when the only evidence it presented of the value of any items was the estimate of the owner as to what they were worth and the total amount did not add up to more than $750?

3. Mr. Perry was accused of possessing items which were found in a room where he was with a woman, Madison Morton. At trial, although Morton could also have been accused of the crimes and she testified against Perry, counsel did not request a normal cautionary instruction which would have ensured that the jury properly evaluated the credibility of this crucial state's witness.

   Was counsel prejudicially ineffective in failing to request this standard cautionary instruction where the testimony of the uncharged accomplice was crucial to the prosecution's claims regarding guilt, incriminated her client and established the bulk of the "facts" upon which the convictions relied?

4. In each of the "to-convict" instructions for several counts, the prosecution added multiple alternative means of committing the crimes.

   Was Mr. Perry's right to jury unanimity violated for those

counts when no unanimity instruction was given, the prosecution did not clearly elect a means and there was insufficient evidence to prove at least one of each means for each crime?

5. An essential element of the crimes of third-degree possession of stolen property and possession of a stolen motor vehicle is that the defendant must "withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto."

   Was the charging document constitutionally insufficient for each of those counts when it failed to include that essential element even with liberal construction?

6. RCW 9.92.110 eliminated the doctrine of "forfeiture by conviction," under which the government had the authority to seize and forfeit a man's property solely because he was convicted of a crime. Further, a sentencing court has no inherent authority to order forfeiture of property.

   In Roberts, this Court specifically rejected the same general order of forfeiture entered in this case. Did the sentencing court err and act outside its statutory authority in ordering forfeiture?

7. Mr. Perry, who is indigent, was ordered to pay more than $3,000 in legal financial obligations without any consideration on the record of this actual financial situation, indigence, employment prospects, employment history and other relevant factors as now required under the Washington Supreme Court's decision in Blazina.

   Should this Court exercise its discretion and order remand under Blazina where the same error occurred here and the same systemic and other problems with our state's LFO scheme are the same here as in Blazina?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Stephane A. Perry was charged by second amended information in Pierce County Superior Court with first-degree criminal trespass, second-degree identity theft, unlawful possession of a stolen vehicle, second-degree possession of stolen property, third-degree

possession of stolen property and unlawful use of drug paraphernalia. CP 133-35; RCW 9.35.020(3); RCW 9A.52.070(1)(2); RCW 9A.56.068; RCW 9A.56.140; RCW 9A.56.160(1)(a); RCW 9A.56.170(1)(2); RCW 69.50.102; RCW 69.50.412(1).

Pretrial motions and hearings were held before the Honorable Frank Cuthbertson on February 13, May 19, and July 8 and 15, 2014, the Honorable Judge Ronald E. Culpepper on July 10, 14-15 and 28, 2014, Honorable Judge Edmund Murphy on July 29 and August 27, 2014, and a jury trial was held before the Honorable Judge Philip K. Sorensen on September 15-19, 2014.[1] The jury convicted as charged. CP 245-51.

On October 3, Judge Sorensen ordered Perry to serve a standard-range sentence for the offenses. RP 3-4; CP 256-70. Perry appealed and this pleading follows. See CP 276.

2. Testimony at trial

Shenelle Williams was working as front desk manager at the Holiday Inn Express hotel on August 14, 2013, when she decided to call police on some guests she said she had asked to leave room 204 but who

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[1]The verbatim report of proceedings in this case consists of 13 volumes, which will be referred to herein as follows:
February 13, 2014, as "1RP;"
May 19, 2014, as "2RP;"
July 8, 2014, as "3RP;"
July 10, 2014, as "4RP;"
the suppression hearing before Judge Culpepper on July 14 and 15, 2014, as "5RP;"
July 15, 2014, in front of Judge Cuthbertson, as "6RP;"
July 28, 2014, as "7RP;"
August 27, 2014, as "8RP;"
the three chronologically paginated volumes containing the proceedings of September 15-18, 2014, as "TRP;"
the transcript of the phone recording of September 16, 2014, as "9RP;"
the sentencing hearing of October 3, 2014, as "SRP."

had not yet left. TRP 242-46. Williams said that, at about 12:30 p.m., she had called the occupants of the room to tell them the credit card used for the security deposit had a payment issue. TRP 261-63.

Williams admitted that the occupants told her they were going to try to get some more money "onto that card" for the deposit and they just needed a little more time. TRP 263-64. Shortly after that, however, Williams call called again and told them they had five minutes to leave or she was calling the police. TRP 264. About five minutes later, she went up and knocked on the door, and the two occupants opened the door a few inches with the latch still on and told her they were still trying to come up with the money. TRP 264-65. At that point, Williams admitted, she went downstairs and called police. TRP 265.

The reservation for the room had been made through a "third party" website agency. TRP 243-48. In those cases, there is really no contact between the person staying in the room and the hotel as far as registration. TRP 243-44. In fact, the third-party booking agent collects the payment. TRP 250. When guests check in they sign a registration card, which has their name and the dates of their stay. TRP 244. The name on the registration card for room 204 was Matthew Lane. TRP 244-45.

Williams acknowledged that the hotel had been paid by Hotels.com and to the best of her knowledge the room was paid for and the reservation was for six nights. TRP 251. Instead, she said, the problem was with the deposit for the room. TRP 251.

In a pretrial defense interview, however, Williams had said that the

deposit *had* been paid. TRP 252-54. And she conceded that she told the occupants of room 204 that they had to leave because they had "over extended their stay," even though the room had been booked for a six day stay and as far as she knew the payment for the first night was fine. TRP 254-55.

Williams explained that the room and tax was separate from the room deposit. TRP 255. On cross-examination, Williams admitted that there had been a card submitted and payment attempted for a security deposit. TRP 263. The card for which there was an imprint by the hotel was the one presented at check in, and it was not the same as the number used to book the room. TRP 262.

There was no name on the document showing the imprint of the card used to put down the security deposit. TRP 262-63.

Williams said the people in the room told her that they were going to put some more money onto that card so that it would work for the deposit. TRP 263. When she went up to threaten them with the police, they were still trying to come up with the money, but she went down and called the police anyway. TRP 265. Williams said that she had contact with the man in the room when she spoke to them about the issue. TRP 267.

At trial, Williams would claim that the people in the room told her they were going to try to go pawn some things, get some money and put it "on" that card. TRP 261. She never said anything to the officers, however, about the people in the room saying they would be going to a pawn shop to get some money. TRP 261.

Tacoma Police Department ("TPD") officers Matthew Graham and Sargent Kieszling responded to Williams' call. TRP 283-86, 350-51. After being told by Williams that the unwanted guest was registered under the name Matthew Lane in room 204, the officers knocked on the door to that room. TRP 287-88. Graham called out that they were police and asked if they could talk to the people inside. TRP 287-88. A male voice said, "just a minute," after which the officers heard sort of a "rustling." TRP 287-88, 353.

A moment or two later, a man, later identified as Stephane Perry, answered the door. TRP 288, 353-54. At trial, Graham testified that he had asked the man what his name was or if he was Matthew Lane, and the man said, "yes," after which the officer asked "if we could come in to discuss the matter of the room." TRP 289, 378. Graham also said that Perry later told him that he had used the name to check in because he had problems using his actual name in the past. TRP 295. Perry also said the room had been booked for him by a friend. TRP 291-92.

Once inside, the officers noted that the room was a "big mess." TRP 314. The first thing Graham noticed was the "multiple needles all over the room, some on the bed, some on the nightstand," and some on a small desk. TRP 289-90. Graham admitted that he had not initially noted anything else which appeared to be paraphernalia in the room. TRP 289.

There was "personal property" lying around all over the room, Graham said, so visually there was "a lot to take in." TRP 314-15. Kieszling said the room was in "pretty great disarray." TRP 354.

The bathroom door inside the hotel room was closed when the

officers entered but after a few moments, a woman came out. TRP 289-90. Kieszling spoke to the woman, identified as Madison Morton. TRP 354-55. The officer would later no recall seeing blood on Morton's pants but thought an officer had done so. The officer also said it was possible that the woman had blood on her clothes from shooting heroin in some unusual place. TRP 370.

Both Morton and Perry were handcuffed. TRP 290. Graham read Perry his rights and questioned him about the room payment. TRP 290. Perry said a friend had booked the room but he had no way to contact her. TRP 291, 313. He did not say she had booked the room for him or made it for him but that she had booked and paid for the room online and was letting him stay there. TRP 313-314. The friend was helping him out and renting his room because Perry was down on his luck and homeless at the time. TRP 291-92, 355.

According to Kieszling, Perry told the officer that he does not steal and he survives instead by selling and trading drugs. TRP 355. He also said he was trying to get more money to pay the deposit through his bank. TRP 292, 354-55.

Graham asked the handcuffed Perry if he could take out the man's wallet from his back pocket to get his ID. TRP 293-94. Perry said yes and, inside the wallet, there was a Washington ID card in his name. TRP 293-94. The officer looked further and saw, also in the wallet, a social security card with the name "Matthew Donald Lane." TRP 294.

There was not a lot of cash, or credit cards, or checks in anybody else's name in the wallet, and Graham admitted he did not see anything

else in it "that appeared to be evidence." TRP 322.

Throughout the room was personal property, such as clothing, that Officer Graham thought "belonged to both occupants." TRP 298. Graham admitted there was stuff on the bed, the floor, on desks and on "every surface almost," as well as under the bed and on the floor. TRP 319. The officer thought, however, that the "lion's share" of the property was on the bed. TRP 319.

Officers told Ms. Morton to collect "her personal property" and police then took what she left behind, assuming it belonged to Perry. TRP 308. At trial, Graham first denied allowing the woman to pack up the needles, instead claiming they ended up in a "Sharps" safety container. TRP 315-16.

When confronted with his police report, however, Officer Graham admitted that, in fact, he had indicated in that report that Morton had gathered up all of the needles herself to spare hotel staff the trouble. TRP 317. There was nothing in the report about a Sharps contained being used. TRP 317-18.

Officer Graham admitted that they let Ms. Morton pick out what she was taking as "hers" and that she took the items she selected in a couple of purses or bags or something similar. TRP 324. Although he squeezed those bags for safety, when nothing felt like a weapon, Graham did not search further. TRP 325.

The needles were not photographed or tested in any way. TRP 317. Officer Graham did not know how many there were because he did not count them. TRP 317. He also said he did not "make a determination

which were actually used and which weren't." TRP 318.

Also found in the collection of items from the room was what Graham thought was "paraphernalia" in the form of a metal spoon. TRP 298-99. The spoon was not lying out but was instead inside an orange bag found somewhere in the room, although neither officer testified as to where and Graham admitted he did not recall. TRP 141, 298-99, 319. But Graham also said something about finding the bag "along with the syringes," without indicating where in the messy room full of syringes that might be. TRP 299.

Graham testified that spoons are "often used in the ingestion of heroin." TRP 299. The spoon was found towards the end of the incident, when officers were gathering what Graham described as Perry's "personal property." TRP 299-300.

When asked what Perry had said about "heroin use in the room," Graham testified that Perry told police that Morton had a drug problem and that the items were hers, but he later "admitted to using it himself." TRP 308.

The spoon was never tested in a lab, nor did the officers field test it. TRP 317-18. When asked why, Graham opined,"it was not necessary." TRP 318. He admitted he had no independent evidence that there had been heroin on the spoon and it was just his "observation." TRP 318.

For his part, Kieszling said "[t]he needles were definitely evidence of drug use" and that one of them had "brown liquid in it" which is "consistent" with heroin. TRP 355-56. Kieszling claimed that Perry told him that "the needle[] with the brown substance in it," was "his." TRP

356.

Like Graham, Kieszling did not analyze the needles, just looked at one which had brown liquid. TRP 368. The officer said brown liquid was "consistent with heroin, black tar heroin" and that he had "never seen anything but brown liquid" in a syringe. TRP 368.

There was no field testing of the spoon, any liquid, syringes or needles. TRP 368-69. Nor was any of that potential evidence secured to send in for testing, for policy reasons. TRP 368-69. Kieszling said Perry was not being arrested for the charge of drug paraphernalia which was part of why they did not photograph the needles or items. TRP 369.

Also in the room somewhere was found a U.S. passport in the name of Matthew Lane. TRP 297-98. A locking safe was found at least partially covered with clothes. TRP 372. Perry did not know to whom the safe belonged but said it was empty. TRP 357.

Graham also testified that there were "[m]ultiple different checkbooks and/or ledgers" taken from the room. TRP 308-309. They were apparently in the safe, found later when the safe was being booked into evidence at the station. TRP 323. The checks were apparently in the name Jordan Zuschin" on them. TRP 349.

Morton admitted that she knew the Zuschin family, that Jordan was the father of the family and that she and Perry had that family as "mutual friends," which is how they met. TRP 433-34.

Under the bed in the hotel room, there were some keys which officers used to open the Subaru parked in the lot of the hotel and which also had two little safe keys. TRP 300-301, 348. Graham said that, after

the officer found the keys, Perry thanked him for "finding my keys," saying that he was borrowing the car from a friend at the time. TRP 292, 306.

There was nothing on the car which would indicate to a layperson that the car had been stolen, but it was later determined that the plates attached to the vehicle did not belong. TRP 306, 328-29. Graham also said, "[a] lot of times plates will be stolen and switched on another car to throw off the scent of it being stolen, if you will." TRP 306. The vehicle was registered to Matthew Lane. TRP 380.

A forensic scientist processed the Subaru and found, inside the driver's side door, two fingerprints on the window and one on the inside rear view mirror. TRP 271-74. She did not testify as to whose prints they were. TRP 268-282.

The woman police allowed to leave, Madison Morton, testified on behalf of the state. TRP 425. After first portraying herself now as a stay-at-home mom, she ultimately admitted that she went with Perry to the hotel to get high on heroin, because Perry owed her money and he was going to pay her back in drugs. TRP 426-434.

Morton first said that Perry had picked her up from work in a blue Subaru and they had gone to the Holiday Inn Express together. TRP 426-27. A moment later, she admitted that she had actually driven the car to the hotel herself because he seemed tired. TRP 427-28. Morton said she thought it was "strange" when he gave a different name to check in, but he explained that he had a warrant and did not want to get arrested. TRP 428.

Morton had a history of committing identity theft herself, having

recently pled guilty to that crime. TRP 419.

Morton also claimed that Perry had told her that the car was his, that his mom had died and left him some money and that he had bought the car from a lot. TRP 429-30. She denied possessing any of the items in the room, and claimed she had not brought in the bag in which the suspected heroin spoon was found. TRP 429-30.

Thomas Thompson had some tools and other items stolen from his garage in Lynnwood on August 13, 2013. TRP 228-29. He identified several items officers found in the room as his, including a case which had a luggage tag with a business card and which he said was worth about $350, a headset which he thought was worth "like $299," a small Nikon camera, a toiletry kit, a glasses case, his ear buds for his phone and his wife's cellular telephone. TRP 230-40.

The luggage tag was buckled closed with the business card inside and would be covered with a black leather flap when the bag was latched. TRP 238-39. The headset recovered from the room had no business card on it. TRP 239.

Matthew Lane testified that he was the victim of a burglary in Seattle in early August of 2013. TRP 338-39. His car keys and two cars, a Subaru Legacy and a Honda Pilot, were stolen, as were several laptop computers, some video games, some passports, some savings bonds issued to him and his daughter and birth certificates and other things which were in a fire safe. TRP 339-43. When shown the empty safe found in the hotel room, he said it looked like his, although it was not really unique and was worth about $30 or $40. TRP 340-41. Lane thought that, when the safe

was stolen, it had contained savings bonds, his passport and his social security card. TRP 341-46.

Lane identified the Subaru as looking like his, but did not recognize all the property in the vehicle. TRP 345-46.

Phone calls made after Perry was arrested from the jail using his identification number were played for the jury at trial. TRP 404-406. In the call, someone named "Jordan" asked if "they" got "all the stuff that was in the trunk of the blue car," then swore. 9RP 4. The other man asked about the "other whip," and the man alleged to be Perry said "[t]he other one's still out there but the key was on the ring." 9RP 4. That man alleged to be Perry also swore about a woman "talking" about showing up in a Subaru and the other man said, "so she fucking gave on everything?" 9RP 5-6. The man then said that was why he told the man not to leave anything in "that motherfucker." 9RP 6.

At that point, the man alleged to be Perry read something including allegations which indicated that officers had opened the safe and found "various financial documents" and savings bonds, and the other man said, "Damn it, Alex. I was going to make a fortune with that shit." 9RP 6.

The other man then asked if "Alex" had "left that other whip in the same place," then, when Alex started describing where the car was, a recording from the operator said the call was being recorded and the other man said, "[y]ou probably don't want to even talk about this shit." 9RP 7. The other man said he was going to try to get the keys from property, then asked about "another set of keys that has, like, probably four different whips on it[.]" 9RP 8. There was some inaudible discussion and the call

was then cut off. 9RP 8.

D. ARGUMENT

1. MR. PERRY WAS DEPRIVED OF HIS RIGHTS TO BE FREE FROM DOUBLE JEOPARDY

Both the Fifth Amendment and Article I, section 9 of our state's constitution protect against multiple punishments for the same offense. See State v. Adel, 136 Wn.2d 629, 965 P.2d 1072 (1988). In this case, Mr. Perry's rights to be free from double jeopardy were violated when he was convicted of both second degree and third degree possession of stolen property (counts IV and V) for the various stolen items found in the room.

The prosecution may bring multiple charges arising from the same incident in a single proceeding, but there are limits. State v. Bobic, 140 Wn.2d 250, 261, 996 P.2d 610 (2000). Because of the prohibition against double jeopardy, where, as here, there are multiple convictions for the same crime, this Court examines the "unit of prosecution" for that crime in order to determine what the Legislature intended to punish as the criminal act. Bobic, 140 Wn.2d at 261.

At the outset, this issue is properly before the Court. See Bobic, 140 Wn.2d at 257. In general, when convictions violate double jeopardy, the issue is one of manifest constitutional error which may be raised for the first time on appeal under RAP 2.5. See Bobic, 140 Wn.2d at 257; see also, State v. Turner, 102 Wn. App. 202, 206, 6 P.23d 1226 (2000), review denied, 143 Wn.2d 1009 (2001).

On review, this Court applies a de novo standard. State v. Turner, 169 Wn.2d 448, 454, 238 P.3d 461 (2010). Applying such review, this

Court should hold that the convictions for both second- and third-degree possession of stolen property violated Mr. Perry's rights to be free from double jeopardy. And it should dismiss one of those convictions as a result. See Turner, 169 Wn.2d at 464.

State v. McReynolds, 117 Wn. App. 309, 71 P.3d 663 (2003), is directly on point. In that case, the defendants were convicted of multiple counts of first- and second-degree possession of stolen property based on items found after a search, which allegedly were stolen from different people. 117 Wn. App. at 331. In determining whether the multiple convictions violated the defendants' rights to be free from double jeopardy, the Court started with examining the statutes for the "unit of prosecution" for the crime of possession of stolen property. 117 Wn. App. at 333-34 .

The McReynolds Court noted that possession of stolen property is defined as "knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto." 117 Wn. App. at 334; see RCW 9A.56.140(1). Next, the Court pointed out, the value of the property is what determines the degree of the crime, but otherwise the conduct remains the same. McReynolds, 117 Wn. App. at 334.

As a result, the Court held, the "unit of prosecution" for the crime remains the same, regardless of the degree of the crime. See RCW 9A.56.150-.170; McReynolds, 117 Wn. App. at 334.

The McReynolds Court then looked at the longstanding rule in

Washington that the identity of the owner of the allegedly stolen property is not, in fact, "an element crimes involving larceny or theft." 117 Wn. App. at 335-36. The Court concluded that the proper unit of prosecution for possession of stolen property is the single act of possessing stolen property over the 15-day period, regardless of the number of items possessed, their individual values or the identity of their owners. 117 Wn. App. at 335.

Because the prosecution in McReynolds charged the defendants with separate counts of possession of various property during a period of time, the Court held, "[t]he separate convictions for the single possession violated the prohibition against double jeopardy." Id.

Here, just as in McReynolds, Mr. Perry was charged with and convicted of both second-degree and third-degree possession of stolen property for items found in the room or on his person in the room. Also as in McReynolds, the prosecution based its multiple charges on the same act of possessing multiple stolen items over the same period of time. And as in McReynolds, this Court must reverse and dismiss one of the two convictions with prejudice.

In general, when there is a violation of the defendant's rights to be free from double jeopardy, this Court will reverse and dismiss, with prejudice the charge with the lesser degree/punishment. See State v. Fuller, 169 Wn. App. 797, 282 P.3d 125 (2012). That is a problem in this case, however, because the higher conviction in this case, second-degree possession of stolen property, was not supported by sufficient evidence and thus cannot be upheld. See argument 2, which follows.

2. THERE WAS INSUFFICIENT EVIDENCE TO PROVE THE ESSENTIAL VALUE ELEMENT OF SECOND-DEGREE POSSESSION OF STOLEN PROPERTY

Both the state and federal due process clauses require that the prosecution must prove all essential elements of crime, beyond a reasonable doubt, to support a conviction. See State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); 14th Amend.; Art. 1, sections 3, 21, 22. Where the prosecution fails in this burden of proof, reversal and dismissal with prejudice, is required. See, State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). This is because retrial after insufficient evidence would violate double jeopardy. See State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

In this case, the conviction for second-degree possession of stolen property (count IV) must be reversed and dismissed with prejudice, because the prosecution failed to present sufficient evidence to prove all the essential elements of the crime.

Second-degree possession of stolen property is defined in RCW 9A.56.160, which provides, as relevant to this case:

> (1) A person is guilty of possessing stolen property in the second degree if:
>
> (a) He or she possesses stolen property, other than a firearm. . .or a motor vehicle, which exceeds seven hundred fifty dollars in value but does not exceed five thousand dollars in value[.]

Second-degree is distinct from third-degree in this regard only that third-degree theft, a gross misdemeanor, requires, in relevant part, that the prosecutor prove the possession of "stolen property which does not exceed

seven hundred fifty dollars in value[.]" See RCW 9A.56.170.

"Value" is further defined. Under RCW 9A.56.010(21), for the purposes of possession of stolen items, "value" means "the market value of the property at the time and in the approximate area of the act." See, e.g., State v. George, 161 Wn.2d 203, 208, 164 P.3d 506 (2007). And that is the definition given to the jury, in instruction 26. CP 233.

But the prosecutor presented insufficient evidence to prove the essential "value" required to support the conviction. Evidence is sufficient to support a conviction if, taken in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime were proved, beyond a reasonable doubt. See, e.g., State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and draws all reasonable inferences in the State's favor therefrom. See State v. Keena, 121 Wn. App. 143, 87 P.3d 1197 (2004).

In this case, the prosecution did not allege in the charging document which property, exactly, it was claiming was valued between $750 and $5,000 - or even the alleged victim's name. See CP 135-36. In opening statement, however, the prosecutor identified the property for the "theft third degree" - presumably the stolen property third degree - as the property stolen from Mr. Thompson, which included "one of his carry bags, some Bose headsets, a telephone" and some other things. TRP 225.

And in closing argument, the prosecutor said the charge alleged in count IV had been brought based upon the savings bonds and their matured value. TRP 478. Indeed, the prosecutor specifically admitted that

he had insufficient evidence and urged the jury to convict based on a "lesser" for count IV. TRP 478-79. But instead of limiting himself to the bonds, the prosecutor then threw out the possession of the safe, the stolen keys, stolen bonds, stolen passports, stolen social security card" as sufficient. TRP 478-79.

Further, in case the jury missed it, a few moments later, the prosecutor again conceded that there was insufficient evidence to prove second-degree possession of stolen property but the jury should instead find Perry guilty on count IV of the lesser of "possession of stolen property third degree." TRP 481.

For her part, counsel noted in her closing that the prosecution had suggested that the jury should convict of third- instead of second-degree possession of stolen property, but argued that there was not sufficient evidence to prove that Mr. Perry was guilty of possessing *any* of the items in the room, due to its messy condition. TRP 491. She also pointed out that the only items for which the prosecution had proven values were the bag and the headphones, which were worth less than the value required for a second-degree conviction. TRP 491-92.

The prosecutor's concession was well-made, because the prosecution presented no evidence of anything of "value" amounting to more than $750 at trial. The prosecutor admitted that the bonds, the basis for the charge according to the prosecution, had not yet matured. And the prosecution did not provide any evidence of the "market value" of the bonds "at the time and in the approximate area of the act." The prosecutor presented no testimony, for example, from an expert who established the

current cash-in value of the bonds, let alone one who testified that they were worth more than $750 or less than $5,000, specifically, as required to prove the second degree offense. Further, the replacement cost of the headphones, "like $299," and the bag, "about $350" according to Thompson, were the only values placed on any of the items from Thompson, and those were already the subject of the third-degree count. See TRP 233-38.

That was insufficient to prove second-degree possession of stolen property. The conviction for second-degree possession of stolen property must be reversed and dismissed with prejudice.

3. COUNSEL WAS PREJUDICIALLY INEFFECTIVE IN FAILING TO REQUEST A STANDARD CAUTIONARY INSTRUCTION

Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.3d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); Sixth. Amend.; Art. I, § 22. Counsel is ineffective despite a strong presumption to the contrary if her conduct falls below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

In this case, this Court should reverse any convictions which survive the other challenges herein, because Mr. Perry was deprived of the effective assistance of appointed counsel when counsel failed to request an applicable cautionary instruction which would have minimized the

prejudicial impact of incriminating testimony from the uncharged accomplice.

In general, Washington courts recognize the very significant issues of credibility when a putative accomplice testifies on behalf of the state and incriminates the defendant. See State v. Harris, 102 Wn.2d 148, 155, 685 P.2d 584 (1984), overruled in part and on other grounds by, State v. Brown, 111 Wn.2d 124, 1557, 761 P.2d 588 (1988), as amended, 113 Wn.2d 520 (1989). Further, criminal law has long recognized that there is an inherent lack of reliability in statements made by someone who is also implicated in the criminal acts. For example, under ER 804(b)(3), the statements of an alleged accomplice where are "self-serving" are actually *assumed* to be false and unreliable. See State v. Roberts, 142 Wn.2d 471, 496, 14 P.3d 713 (2000).

Indeed, more than 40 years ago, our highest state court approved of giving a cautionary instruction to jurors in cases where the prosecution uses accomplice testimony in a criminal case, declaring that, "[f]ar from being superfluous or objectionable, a cautionary instruction is mandatory if the prosecution relies upon the testimony of an accomplice," unless the evidence is substantially corroborated. State v. Carothers, 84 Wn.2d 256, 269, 525 P.2d 731 (1974), overruled by State v. Harris, 102 Wn.2d 148, 153-54, 685 P.2d 584 (1984) (overruled in part and on other grounds by, State v. McKinsey, 116 Wn.2d 911, 810 P.2d 907 (1991). As the Carothers Court declared:

> While the cautionary instruction may, in the circumstances of the case, apply only to one witness and the jury will have no doubt about the witness to whom the instruction is referable, the

> court does not give the jury its evaluation of the particular witness before it. Rather, it instructs the jury about the provisions of a rule of law applicable to the class to which the witness belongs. It is a rule which has long found favor in the law, evolved for the protection of the defendant.

Id.

Recognizing the problematic nature of accomplice testimony, a pattern jury instruction was crafted in this State in order to caution juries about its inherent unreliability. Washington Pattern jury instruction or "WPIC" 6.05, which provides, in relevant part:

> The testimony of an accomplice, given on behalf of the [State], should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilt upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

The failure to give the instruction is "always reversible error when the prosecution relies solely on accomplice testimony." Harris, 102 Wn.2d at 155 (emphasis removed). Further, even if there is independent evidence corroborating the accomplice's testimony, reversal is required for failing to give the cautionary instruction unless the accomplice testimony "was substantially corroborated by testimonial, documentary or circumstantial evidence." Id.

The WPIC instruction is not new, nor are issues of concern about the reliability of an accomplice. Yet counsel did not propose the cautionary instruction. See CP 84-88.

In general, there is sufficient evidence to support giving an instruction if any rational trier of fact could find the facts necessary. See State v. Vinson, 74 Wn. App. 32, 37, 871 P.2d 1120, review denied, 125

Wn.2d 1002 (1994). In addition, in looking at whether the evidence was sufficient to support an instruction, this Court views the evidence in the light most favorable to the party requesting the instruction. See State v. Jarvis, 160 Wn. App. 111, 246 P.3d 1280, review denied, 171 Wn.2d 1029 (2011). A defendant is entitled to have the jury instructed on his theory of the case when there is evidence to support that theory. Id. And jury instructions are improper if they do not permit the defendant to argue her theories of the case, if they mislead the jury, or if they do not properly inform the jury of the applicable law. See State v. Vander Houwen, 163 Wn.2d 25, 29, 177 P.3d 93 (2008).

Here, but for her statements accusing Perry and absolving herself, Morton could have been charged with essentially all of the same crimes that Perry faced. She admitted driving the car. She admitted using drugs in the room. She admitted being in the room where stolen property was found and in the car which had a trunk full of items. For the purposes of an instruction, an accomplice is someone who could potentially "be indicted for the same crime for which the principal is being tried." See State v. Boast, 87 Wn.2d 447, 455, 553 P.2d 1322 (1976).

It was only Morton's claims that she did not know anything about the car being stolen and that Perry had told her a story about buying it which pointed to Perry alone for the possession of the motor vehicle. And it was only Morton's claims that she did not know about anything in the room, or in the safe, which "proved" that she was not also guilty as an accomplice. It is irrelevant that she was uncharged; what is relevant is that she could well have been and her testimony was clearly self-serving in that

it pinned the crimes on Perry, not her.

Indeed, counsel herself recognized that the credibility of Morton's statement was crucial to the state's case and that Morton herself was an uncharged accomplice. See TRP 418-19 (counsel talked to Morton before her testimony, urging the court to appoint counsel for Morton because she was going to admit incriminating things even while denying she was guilty of anything). TRP 418-19. Counsel told the court that Morton's statements "could be considered as inculpatory" so that Morton needed the advice of an attorney. TRP 418-19.

Further, the prosecutor admitted that Morton herself could have been charged with several of the crimes. TRP 499-500. The prosecutor then relied on the police not thinking, after talking with Morton, that there was "probable cause for her arrest from anything she said," so Morton had no issues of self-incrimination. TRP 499-500. But for the officers' determination to believe Morton, however, she could well have been arrested with Mr. Perry and charged with the same counts.

An attorney provides constitutionally deficient performance when there is no legitimate strategic or tactical reason which can be found for what she has done or failed to do. See Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d (1985). A decision is not "tactical" or "strategic" if it is not reasonable under prevailing professional norms. Id. As a result, "[t]he proper measure of attorney performance remains simply reasonableness" in light of the situation and what other attorneys would do. Strickland, 466 U.S. at 688.

Counsel's failure to property research the relevant law and propose

proper instructions may amount to ineffective assistance. See State v. Kyllo, 166 Wn.2d 856, 215 P.3d 177 (2009). In Kyllo, for example, trial counsel proposed a jury instruction on self-defense which misstated the harm the person had to apprehend. But there were several cases which "should have indicated to counsel that the pattern instruction was flawed." 166 Wn.2d at 865. Where there was relevant caselaw at the time of trial that counsel should have discovered with proper research, the Court found that counsel's conduct could not constitute legitimate trial strategy or tactics, and fell below an objective standard of reasonableness. Id.

Similarly, in In re Hubert, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007), counsel's failure to be aware of a potential defense and failing to request a relevant instruction was "plainly deficient performance." Put bluntly, the Court declared, "[w]here counsel in a criminal case fails to advance a defense authorized by statute, and there is evidence to support the defense, counsel's performance is deficient." Id. While a strategic choice "made after a thorough investigation of law and facts relevant to plausible options" would not be ineffective, choices made after less than full and complete investigation are only reasonable to the extent that it is reasonable to limit the investigation. Id. The trial attorney's failure to investigate the relevant statutes was not a legitimate trial tactic. Id.

Reversal is required. Where, as here, counsel's performance falls below an objective standard of reasonableness, the defendant must should that there is a reasonable probability that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." Id.

Counsel's failure to propose this cautionary instruction in order to

properly instruct the jury on how to fairly evaluate the testimony of the single most important witness against her client in unfathomable.

This is especially so because *the entire defense* was based upon trying to discredit Morton's statements as unreliable because she was trying to shift blame from herself as potentially guilty of the bulk of the crimes. Counsel argued that the jury should not believe Morton because she had potential "self-interest" against being charged herself. TRP 488. And indeed, counsel tried to cast blame on Morton, reminding the jury that Morton had a prior conviction for identity theft in the second degree, and that she was, in fact, "in the room." TRP 488-89. Counsel argued that the jury should question Morton's credibility because her statements which make Perry "look pretty bad" might "be the goal of someone who's trying to take the attention away from themselves[.]" TRP 489.

Further, the entire defense was that someone else could have brought the stolen property there, including Morton. TRP 489. Counsel pointed out that Morton was addicted to heroin and was there to use drugs. TRP 490. Counsel also said the items gathered up by police as Perry's but they could have belonged to someone else. TRP 491. She said that, even if Perry had known that the bag was in the messy room, that did not mean he knew it was stolen. TRP 491.

In this situation, there could be no legitimate strategic or tactical reason to fail to propose a relevant, helpful jury instruction which would have supported that defense. Counsel was prejudicially ineffective in failing to propose the instruction and this Court should so hold. Should any charges survive the other challenges herein, such remaining counts

should be reversed and new counsel ordered appointed below, because there is more than a reasonable probability that counsel's unprofessional errors affected the outcome of the trial. Mr. Perry's rights to effective assistance of counsel was violated on one of the most important issues in his case. This Court should so hold and should reverse.

4. THE PROSECUTION FAILED TO PROVE ALL OF THE MEANS SET FORTH IN THE INSTRUCTIONS AND PERRY'S RIGHTS TO AN UNANIMOUS JURY WERE REPEATEDLY VIOLATED

A "to-convict" instruction "must contain all of the elements of the crime because it serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence." State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 100 (2003). If an unnecessary element is included in the to-convict without objection and the jury is instructed as such, the prosecution assumes the burden of proving that added element, beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 102-103, 954 P.2d 900 (1998).

The issue is more complex when the added language in the "to-convict" is not an additional element but instead an alternate means of committing the crime. Article I, section 21 of our state constitution guarantees the right to an unanimous jury verdict, which means a defendant may only be convicted if a jury unanimously agrees that he committed the charged act. See State v. Kitchen, 110 Wn.2d 403, 409, 765 P.2d 105 (1988).

As a result, when the "to-convict" alleges multiple potential means of committing a crime and no unanimity instruction is given, to uphold the

conviction this Court must find there is either sufficient evidence to prove every one of the alternative means or that this is one of the rare cases where the Court can determine that the verdict was based on only one alternative means and substantial evidence supports that means. See State v. Lillard, 122 Wn. App. 422, 435, 93 P.3d 969 (2004).

In this case, the convictions on counts I and II violated Mr. Perry's rights to jury unanimity. For those counts the prosecutor shouldered the burden of proving each alternative means included in the "to-convict" and the failure to give an unanimity instruction cannot be deemed harmless.

Taking the latter charge first, for Count II, the charge of second-degree identity theft, as noted, *infra*, Instruction 10 provided:

> A person commits the crime of identity theft in the second degree when, with intent to commit any crime, he or she knowingly **obtains, possesses, uses, or transfers** a means of identification or financial information of another person, living or dead, and obtains credit, money, goods, services or anything else that is $1500 or less in value or does not obtain anything of value.

CP 217 (emphasis added). The "to-convict," Instruction 11 provided, in relevant part,

> To convict the defendant of identity theft in the second degree, the following elements of the crime must be proved beyond a reasonable doubt:
>
> > (1) That on or about August 14, 2013, the defendant knowingly **obtained, possessed, used, or transferred or used any means of identification or financial information of another person, living or dead;**
> >
> > (2) That the defendant acted with the intent to commit any crime;
> >
> > (3) That the defendant obtained credit, money, goods, services or anything else that is $1500 or less in value from the acts described in element (1) or did not obtain any

credit, money, goods, services or other items of value[.]

CP 218 (emphasis added).

Thus, the prosecution had the burden of proving that, on or about August 14, 2013, Mr. Perry obtained, possessed, used or transferred the relevant items. And because there was no unanimity instruction, there had to be sufficient evidence to prove each means, unless it is very clear no violation of the right to unanimity occurred.

In closing argument, the prosecutor referred to all of the means of committing the crime, and the prosecutor also said that Perry "possessed Matthew Lane's passport," which is "identification," and his "financial information" including his Social Security number and $850 worth of savings bonds. TRP 473-74.

The prosecutor then posited the theory that Perry was possessing items with intent to traffic in stolen property, based on the jail call. TRP 475. This time, the prosecutor referred to the uncharged items in the back of the car and the items in the safe. TRP 475.

But the prosecutor also threw out another theory - that Mr. Perry was guilty because he possessed the items with intent to commit "criminal impersonation." TRP 476. The prosecutor went on:

> Now, that requires that the person assumes a false identity and does any act to defraud another.
>
> Well, we know that Mr. Perry pretended to be Matthew Lane. He did an act under the assumed identity to defraud the hotel. **So, had he smoked and burnt holes in his pillowcase and poured things out and left, who would get something in the mail? Matthew Lane would. Not the defendant**.

TRP 144 (emphasis added). The prosecutor then told the jury, "I would

argue that the lesser included does not apply, because that's simply possessing someone's ID, **not using it**." TRP 144 (emphasis added).

Thus, the prosecutor confused the issues, instead of clearly electing which of the charged means he was relying on for guilt. First, he talked about possession; then he talked about use.

Not only that, what he said was, in fact, *wrong*. There was *no* evidence that the card used to provide the deposit was in Matthew Lane's name, or anyone's name in particular. There was also no evidence that Lane would have, in fact, gotten a bill in the mail if anything had happened at the hotel.

The prosecution also made the same error and reversal is also required for the violation of Mr. Perry's rights to jury unanimity for count I, the criminal trespass charge. For that charge, instruction 6, the "to convict" instruction, provided in relevant part:

> To convict the defendant of the crime of criminal trespass in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> > (1) That on or about the 14th day of August, 2013, the defendant knowingly **entered or remained** in a building;
> >
> > (2) That the defendant knew that the **entry or remaining** was unlawful.

CP 13 (emphasis added). And the jury was also told, in instruction 8, that a person "**enters or remains unlawfully** in an upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain." CP 16.

Here, there was not proof beyond a reasonable doubt that Mr. Perry

"entered" unlawfully. He entered with a key. And while it later came to light that there was a problem with a deposit, there was also evidence that he was trying to remedy that problem. A person only "enters" unlawfully if they are not *then* licensed, invited or otherwise privileged to enter, not if their license or privilege to enter is later revoked and they are asked to leave. See, e.g., State v. R.H., 86 Wn. App. 807, 810-811, 939 P.2d 217 (1997).

A person who enters a motel room still maintains some limited rights in the room even if there is later evidence showing he had obtained the room by fraud. See, e.g., U.S. v. Bautista, 362 F.3d 584 (9th Cir. 2004) (where defendant makes an online reservation using a stolen credit card, he still had a reasonable expectation of privacy in his motel room because there was not yet any investigation or information showing yet that he had obtained the room by fraud); see also, U.S. v. Young, 573 F.3d 711 (2009) (defendant "maintained a reasonable (although fraudulent) expectation of privacy in his hotel room and the luggage he left in the hotel room, because hotel staff had not evicted him from the room).

Further, unlawful entry is not presumed simply because someone enters a place with intent to commit a crime inside, like smoking drugs or keeping stolen items. See, State v. Allen, 127 Wn. App. 125, 110 P.3d 849 (2005).

Here, in closing argument, the prosecutor argued not only that the jury should find Perry guilty of criminal trespass for remaining in the room after he was asked to leave but also for "entering" unlawfully. TRP 472-73. The prosecutor told the jury that Perry was not "lawfully there"

because he was there "under someone else's name, so that's not lawful," and thus Perry could be found guilty under either theory. TRP 473.

The prosecution shouldered the burden in the "to-convict" to prove both that Perry "entered" unlawfully and that he "remained" unlawfully. Because the prosecutor relied on both theories but there was insufficient evidence to prove unlawful entry, reversal and remand is required for the violation of Mr. Perry's right to jury unanimity.

Both the identity theft and criminal trespass convictions were not adequately supported by sufficient evidence as required under the "to-convict" instructions and the mandate of jury unanimity. This Court should so hold and should reverse those convictions.

5. THE CHARGING DOCUMENT WAS CONSTITUTIONALLY INEFFECTIVE FOR THE THIRD-DEGREE POSSESSION OF STOLEN PROPERTY AND POSSESSION OF A STOLEN CAR CRIMES

Under both the state and federal constitutions, the defendant in a criminal case is constitutionally entitled to sufficient notice and an opportunity to prepare to meet the prosecution's case. State v. Johnson, 180 Wn.2d 295, 300, 325 P.3d 135 (2014). As a result, where, as here, an "information" is filed which serves as the charging document, the document must be "sufficient," which means it must 1) contain all the essential elements of the charged offense, 2) give the defendant adequate notice of the charges and 3) protect the defendant against double jeopardy. See, State v. Kjorsvik, 117 Wn.2d 93, 109, 812 P.2d 86 (1991). If it does not meet those standards, a charging document is constitutionally insufficient and a conviction gained as a result must be reversed and the

charge dismissed without prejudice. Id.

In this case, the counts of possession of a stolen vehicle and third-degree possession of stolen property must be reversed, because the information charging those counts was constitutionally insufficient.

This Court reviews all challenges to the sufficiency of an information de novo. See Johnson, 180 Wn.2d at 300. However, the way the Court construes the charging document depends upon whether the document is challenged below or for the first time on appeal. See State v. Rivas, 168 Wn. App. 882, 887, 278 P.3d 686 (2012), review denied, 176 Wn.2d 1007 (2013).

In both situations, the document is only constitutionally adequate "if all essential elements of a crime, statutory and nonstatutory, are included in the document so as to apprise the accused of the charges against him or her and to allow the defendant to prepare a defense." State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). However where, as here, the challenge to an information is raised for the first time on appeal, the reviewing court construes the document "liberally" to determine if the necessary facts appear in or can be found by fair construction of the charging document. See, State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

Count III, the unlawful possession of a stolen vehicle charge, and Count V, the third-degree possession of stolen property charge, were insufficient even applying the liberal standard on appeal.

Both crimes - possession of stolen property and unlawful possession of a stolen vehicle - require proof of possession of stolen

property. See State v. Satterthwaite, 186 Wn. App. 359, 361, 344 P.3d 738 (2015). RCW 9A.56.150(1) defines "possessing stolen property" as knowingly to receive, retain, possess, conceal or dispose of stolen property knowing that it has been stolen and **to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto**." (Emphasis added).

Thus, an essential element of any crime of possession of stolen property - including possession of a stolen vehicle - is that the defendant must "withhold or appropriate" the stolen item "to the use of any person other than the true owner or person entitled thereto." Satterthwaite, 186 Wn. App. at 361.

As this Court recently explained in Satterthwaite, the "withhold or appropriate" requirement is an essential element of possessing stolen property such as a car, because such conduct "is necessary to establish the very illegality of the behavior charged," and it is thus "an essential element of chapter 9A.56 RCW's possession of stolen property offenses, including RCW 9A.56.068's possession of a stolen motor vehicle. 186 Wn. App. at 364-65.

Here. neither Count III nor Count V alleged the essential "withhold or appropriate" element, nor can it be found even with liberal construction. As charged in the second amended information, Count III accused Perry of unlawful possession of a stolen vehicle, as follows:

> That STEPHANE ALEXANDRE B. PERRY, in the State of Washington, on or about the 14th day of August, 2013, did unlawfully and feloniously knowingly [sic] possess a stolen motor vehicle, knowing that it had been stolen, contrary to RCW

> 9A.56.068 and 9A.56.140, and against the peace and dignity of the State of Washington.

CP 134. In Count V, the prosecution charged Perry with third-degree possession of stolen property, as follows:

> That STEPHANE ALEXANDRE B. PERRY, in the State of Washington, on or about the 14th day of August, 2013, did unlawfully and knowingly receive, retain, possess, conceal, or dispose of stolen property other than a firearm or a motor vehicle, belonging to another, of a value that does not exceed $750 or includes ten or more stolen merchandise pallets, or ten or more stolen beverage crates, or a combination of ten or more merchandise pallets and beverage crates, contrary to RCW 9A.56.140(1) and 9A.56.170(1)(2)[.]

CP 134-35.

Nowhere in either of those allegations is the essential element that the defendant must "withhold or appropriate" the stolen item "to the use of any person other than the true owner or person entitled thereto." Satterthwaite, 186 Wn. App. at 361.

Nor can that essential element be fairly found even with liberal construction where, as here, a charging document accuses the defendant of possessing stolen property, knowingly possessing stolen property, or possessing property belonging to another. 186 Wn. App. at 365. As this Court noted in Satterthwaite, that language is insufficient to allege "withholding or appropriating" a stolen item "to the use of a person other than the owner." Id.

Even if they survive the other challenges herein, Perry's convictions for counts III and V must still be reversed and dismissed without prejudice, because of the constitutional insufficiency of the charging document.

6. THE TRIAL COURT ACTED WITHOUT STATUTORY AUTHORITY IN ORDERING FORFEITURE OF PROPERTY AS A CONDITION OF SENTENCE

In addition to the many trial errors in this case, there were also serious sentencing errors, including a sentencing condition handwritten in which provides "forfeit items in property" and a boilerplate condition which provided, "[a]ll property is hereby forfeited." CP 261-62. This Court should strike these orders of forfeiture, because a sentencing court has no inherent authority to order forfeiture, there was no statute supporting the order and the order was in violation of RCW 9.92.110, which abolished the doctrine of allowing forfeiture of property simply based on a defendant's conviction of any crime.

In general, a sentencing court's authority to impose conditions of a sentence is limited by statute. See State v. Zimmer, 146 Wn. App. 405, 414, 190 P.3d 121 (2008), review denied, 165 Wn.2d 1035 (2009). Under the Sentencing Reform Act, the Legislature alone has the authority to establish the scope of legal punishment. Id. As a result, a sentencong court has only the authority granted by the Legislature by statute. See State v. Hale, 94 Wn. App. 46, 53, 971 P.3d 88 (1999).

"Forfeitures are not favored." City of Walla Walla v. $401.333.44, 164 Wn. App. 236, 237-38, 262 P.3d 1239 (2011). In addition, the authority to order forfeiture is wholly statutory. See Bruett v. Real Property Known as 18328 11th Ave. N.E., 93 Wn. App. 290, 296, 968 P.2d 913 (1998); see also, Espinoza v. City of Everett, 87 Wn. App. 857, 865, 943 P.2d 387 (1997), review denied, 134 Wn.2d 1016 (1998).

As a result, a trial court has no authority to order forfeiture unless

there is a specific statute authorizing that order. State v. Alaway, 64 Wn. App. 796, 800-801, 828 P.2d 591, review denied, 119 Wn.2d 1016 (1992).

Importantly, this is true even when a defendant is accused of a crime. As this Court has noted, there is no "inherent authority to order the forfeiture of property used in the commission of a crime." Alaway, 64 Wn. App. at 800-801. It is only with statutory authority and after following the procedures in the authorizing statute that the government may take property by way of forfeiture. Id.; see Espinoza, 87 Wn. App. at 866.

Here, there was no statutory authority cited by the prosecutor when giving the recommendation including "forfeiture of any items and properties in the property room" at sentencing. SRP 4. And the court said nothing about forfeiture in entering the judgment and sentence. But the judgment and sentence had a handwritten order that Mr. Perry must "forfeit all items in property" and further a mark in a box next to boilerplate preprinted on the form which provided, more broadly, "[a]ll property is hereby forfeited." CP 261-63.

With these orders, the sentencing court authorized government forfeiture of a citizen's property without due process or any legal authority for such an exertion of power.

Roberts, supra, is directly on point. In Roberts, also a case from Pierce County, the sentencing court wrote on the judgment and sentence, "[f]orfeit any items seized by law enforcement," as a condition of sentencing. 185 Wn. App. at 96. This Court rejected the prosecution's

efforts to argue that there was any authority for such an order of forfeiture simply based on the conviction, instead holding that there was no statutory or inherent authority authorizing government forfeiture of items as a condition of sentencing. 185 Wn. App. at 95-96.

Further, the Court rejected the idea that a defendant must somehow make a motion for the return of property or meet some other burden in order to challenge the unlawful condition of sentencing authorizing immediate forfeiture of property. 185 Wn. App. at 96.

As this Court has specifically held, a defendant is not automatically divested of his property interests in even items used to create contraband, simply by means of conviction. Alaway, 64 Wn. App. at 799. Instead, "the State cannot confiscate" a citizen's property "merely because it is derivative contraband, but instead must forfeit it using proper forfeiture procedures." Id.

And the Legislature has carefully crafted such procedures and has included protections against governmental abuse of the awesome authority of taking away the property of a citizen. See, e.g., RCW 10.105.010 (law enforcement may seize certain items to forfeit but must serve notice and offer a hearing, etc.); RCW 69.50.505 (controlled substance forfeitures requiring notice, an opportunity to heard, a right of removal, a civil proceeding etc.); Smith v. Mount, 45 Wn. App. 623, 726 P.2d 474, review denied, 107 Wn.2d 1016 (1986) (upholding the constitutionality and propriety of having the chief officer presiding over a proceeding where his agency stands to financially benefit if he finds against the citizen).

Further, many forfeiture statutes again vest the authority for such

proceedings in the law enforcement agencies or executive branch, not the court, as well, and further require certain procedures to be followed to establish, **in separate civil proceedings**, that property should be forfeited as a result of its relation to a crime. See RCW 9A.83.030 (money laundering; attorney general or county prosecutor file a separate civil action in order to initiate those proceedings, etc.); RCW 9.46.231 (gambling laws: 15 days notice, etc.). And CrR 2.3(e) governs property seized with a warrant supported by probable cause and issued by a judge which requires serving the person when the item is seized with a written inventory and information on how to get their property back if they believe their property was improperly seized under the warrant. But that rule is limited to items deemed "(1) evidence of a crime; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) weapons or other things by means of which a crime has been committed or reasonably appears to be committed[.]"

None of these statutes or rules provides any authority for a sentencing court in a criminal case to order forfeiture of the property of a defendant seized by police based solely upon his criminal conviction without at least a modicum of proof that the property was somehow involved in or the fruits of criminal activity. Nor do the statutes authorize such a forfeiture without any of the process which is constitutionally due before the government may seize the property of a man or at least the process the Legislature required before such forfeitures may occur. See, e.g., Alaway, 64 Wn. App. at 798 (rejecting the idea that the sentencing

court had "inherent power to order how property used in criminal activity should be disposed of").

Thus, there can be no question that forfeiture proceedings must be pursued through the proper means of an authorizing statute, not simply ordered off-the-cuff as part of a criminal conviction. And indeed, to the extent that the trial court assumed it had authority to order the forfeiture based upon the criminal conviction, that assumption runs directly afoul of RCW 9.92.110, which specifically abolished the doctrine of forfeiture by conviction. That statute provides, in relevant part, "[a] conviction of [a] crime shall not work a forfeiture of any property, real or personal, or of any right or interest therein." Thus, under the statute, the mere fact that the defendant was convicted of a crime is not sufficient on its own to support an order of forfeiture.

Here, the same county in which the improper order of forfeiture was entered in Roberts was apparently using the same draft form and same automatic forfeiture provisions at the time of Mr. Perry's sentencing. As in Roberts, this Court should strike the improper conditions or, upon reversal and remand, should indicate that if Mr. Perry were to be reconvicted after retrial, Roberts must be followed at sentencing.

7. THIS COURT SHOULD REVERSE AND REMAND FOR RESENTENCING BECAUSE THE LOWER COURT DID NOT MAKE THE REQUIRED INQUIRY BEFORE IMPOSING LEGAL FINANCIAL OBLIGATIONS ON THE INDIGENT APPELLANT AND THE CONCERNS RAISED BY OUR HIGHEST COURT IN BLAZINA ARE PRESENT HERE

To the extent any charges survive the other challenges raised herein, this Court should still reverse and remand for resentencing with

instructions for the trial court to engage in the analysis set forth by the Supreme Court recently in State v. Blazina, supra, prior to imposing legal financial obligations on Mr. Perry, who is indigent. Because the trial court did not follow the requirements of RCW 10.01.160(1), and because this case presents the very same policy concerns which compelled our highest court to act even absent an objection below in Blazina, this Court should reverse and remand for a new sentencing hearing.

Under RCW 10.01.160(1), a trial court can order a defendant convicted of a felony to repay court costs as a part of a judgment and sentence. Another subsection of the same statute, however, prohibits a court from entering such an order without first considering the defendant's specific financial situation. RCW 10.01.160(3) provides:

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

In Blazina, our highest Court recently interpreted RCW 10.01.160(3). Blazina involved two consolidated cases, each with an indigent defendant. 344 P.3d at 683-84. In one case, the sentencing court ordered a $500 crime victim penalty assessment, a $200 filing fee, a $100 DNA fee, $1,500 for assigned counsel and restitution to be determined "by later order." 344 P.3d at 682-83. The other sentencing court ordered the same fees except only $400 for appointed counsel and an additional $2,087.87 in extradition costs. Id.

Neither defense counsel raised an objection to the imposition of the costs or fees on their indigent client. Id.

On review, the defendants argued that the failure to comply with the requirements of RCW 10.01.160(3) on the record was error. The prosecution first argued that the issue was not "ripe for review" until the state tried to enforce collection of the amounts imposed. 344 P.3d at 682-83 n. 1. The Supreme Court majority found instead that the issue was primarily legal, did not require further factual development and involved a final action of the sentencing court, a conclusion of "ripeness" with which the concurring justice seemed to agree. Id.[2]

The Court majority also found that RCW 10.01.160(3) was mandatory, noting that it requires that a trial court "**shall not**" order costs without making an "individualized inquiry" into the defendant's individual financial situation and their current and future ability to pay, and that the trial court "**shall**" take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose" in determining the amount and method for paying the costs. 344 P.3d at 685 (emphasis in original). And the Court found that, in this context, the word "shall" is imperative. Id.

Further, the majority agreed with the defendants in both of the consolidated appeals that the individualized inquiry must be done on the record. 344 P.3d at 685. They then rejected the a "boilerplate" clause, preprinted on the judgment and sentence, as sufficient:

> Practically speaking, this imperative under RCW 10.01.160(3) means that the court must do more than sign a judgment and sentence with boilerplate language stating that it

[2]This portion of the decision was unanimous, but one justice would have used a different method of reaching the issues on appeal. See 344 P.2d at 686.

> engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors. . . such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

344 P.3d at 686.

The Blazina majority then gave sentencing courts guidance on making the determination of "ability to pay," referring them to the comments to GR 34 which set forth nonexclusive ways of determining indigency, including looking at household income, federal poverty guidelines, whether the person receives federal assistance and other relevant questions, specific to that particular defendant. Id.

The Blazina majority then held that, in crafting RCW 10.01.160(3) the Legislature "intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant's circumstances." Id.; see also, 344 P.3d at 686 (Fairhurst, J., concurring). Further, the majority believed that the trial judge's failure to consider the defendants' ability to pay in the consolidated cases on review in Blazina was "unique to these defendants' circumstances." Blazina, 344 P3d at 683-84. The Court therefore believed that the failure of a sentencing court to properly consider the defendant's present and future ability to pay was an error not expected to "taint sentencing for similar crimes in the future," unlike the errors in Ford. 344 Wn.2d at 683.

But the majority nevertheless decided to reach the issue. While stopping short of faulting lower appellate courts for declining to exercise their discretion to do so thus far, the Blazina Court held that "[n]ational

and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case." 344 Wn.2d at 683. The Court chronicled national recognition of "problems associated with LFO's imposed against indigent defendants," including inequities in administration, impact of criminal debt on the ability of the state to have effective rehabilitation of defendants and other serious, societal problems "caused by inequitable LFO systems." Id. One of the proposed reforms the Court mentioned was a requirement "that courts must determine a person's ability to pay before the court imposes LFOs." Id.

The Court then noted the flaws in our own state's LFO system and the system's "problematic consequences." 344 P.3d at 684. The Court was highly troubled by the fact that, in our state, LFOs accrue a whopping 12 percent interest and potential collection fees. 344 P.3d at 683-85. And the Court described the ever-sinking hole of criminal debt, where even someone trying to pay who can only afford $25 a month will end up owing *more* than initially imposed even after *10 years* of making payments. Id. The Court was concerned that, as a result, indigent defendants are paying higher LFOs than wealthy defendants, because of the accumulation of interest based on inability to pay. Id.

Further, the Court noted, defendants unable to pay off LFOs are subject to longer supervision and entanglement with the courts, because courts retain jurisdiction until LFOs are completely paid off. 344 P.3d at 684-85. This increased involvement "inhibits reentry," the justices noted, because active court records will show up in a records check for a job, or

housing or other financial transaction. Id. The Court recognized that this and other "reentry difficulties increase the chances of recidivism." Id.

Finally, the Blazina majority pointed to the racial and other disparities in imposition of LFOs in our state, noting that disproportionately high LFO penalties appear to be imposed in certain types of cases, or when defendants go to trial, or when they are male or Latino. 344 P.3d at 685-86. The court also noted that certain counties seem to have higher LFO penalties than others. Id.

The concurrence in Blazina agreed that the issue required action by the Court, but disagreed with how the majority applied RAP 2.5(a) and its exceptions. 344 P.3d at 686-87. The concurrence would have found the error non-constitutional and would not have addressed it under RAP 2.5(a)(3) but would instead have reached the issue under RAP 1.2(a), "to promote justice and facilitate the decision of cases on the merits." Id. The concurring justice felt it was appropriate for the court to exercise its discretion to reach the unpreserved error "because of the widespread problems" with the LFO system as applied to indigents "as stated in the majority." Id. And she also would have reached the error, because "[t]he consequences of the State's LFO system are concerning, and addressing where courts are falling short of the statute will promote justice." Id.

In this case, at sentencing, Mr. Perry's personal financial situation was not discussed but the difficulties he has faced and his addiction were noted. SRP 4-7. Mr. Perry had a long history of substance abuse and had been living on his own and in the juvenile system since about age 12, when he was "essentially abandoned by his adoptive mother." SRP 4-7.

Counsel pointed out that Mr. Perry had struggled with sobriety and had some small success in the past. SRP 7.

Without any discussion whatsoever of Mr. Perry's current financial situation, his potential ability for employment, his skills, his assets and debt or any of the other relevant, crucial questions trial courts should examine under RCW 10.01.160 after Blazina, the trial court simply ordered the legal financial obligations and set the amount for the public defender based on whether there had been a trial or not, not Mr. Perry's actual present or future ability to pay. SRP 11, 13.

On the judgment and sentence, the same pre-printed clause which was found insufficient in Blazina was marked in this case. That clause provided, in relevant part, as follows:

> 2.5 **ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS** The court has considered the total amount owing, the defend[ant]s past, present and future ability to pay legal financial obligation, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 261-62. Further, the trial court ordered a $500 crime victim assessment, $100 DNA database fee, $1500 for court-appointed attorney fees/costs and a $200 criminal filing fee, for a total of $2300. Id. The order also required that payments will be "commencing immediately," and that the court "shall report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan" unless the court set a different rate. Id. Mr. Perry was ordered to provide financial and other

information to set up payments and to himself pay any costs of "services to collect unpaid legal financial obligations per contract or statute." CP 262-63.

Just like the defendants in Blazina, Mr. Perry is indigent. Just like those defendants, he is already subject to 12% interest, compounding now. And just as in Blazina, here, there was no consideration of whether he has any present or future likelihood of having any hope of paying, despite the requirements of RCW 10.01.160 as noted in Blazina.

Further, just as in Blazina, the only findings on Mr. Perry's "ability to pay" were the insufficient pre-printed "boilerplate" findings, entered without consideration of Mr. Perry's individual circumstances.

Thus, Mr. Perry is in the same situation as the defendants in the consolidated cases in Blazina. He will suffer the impacts of the unfair and unjust system our Supreme Court has now condemned unless this Court follows Blazina and orders resentencing. The resentencing court should be ordered to consider Mr. Perry's "individual financial circumstances and make an individualized inquiry into the defendant's current and future ability to pay," on the record as set forth in Blazina, before deciding whether it should even impose legal financial obligations.

Pursuant to RAP 1.2(a), this Court is tasked with interpreting the rules and exercising its discretion in order to serve the ends of justice. Blazina was a watershed in our state. Every single justice on our highest court agreed that our state's system of imposing legal financial obligations is so racially biased, unfair, improperly enforced and debilitating to the possibility of any rehabilitation for indigents that the justices unanimously

agreed to take the extremely unusual step of addressing the issue for the first time on appeal, *even though they agreed it was non-constitutional error*.

In so doing, the Blazina Court took a courageous step towards working to ensure that poor people convicted of crimes are not permanently marginalized as a sub-class of our society, never able to climb out from the ever-deepening hole of legal debt even if, as the Blazina Court noted, those people make full minimum payments for *years*.

For our highest state court to so rule sends a very clear message. While it was not error or an abuse of discretion for lower appellate courts to fail to take action prior to Blazina, the unprecedented message of Blazina is that our highest Court intends to ensure that the injustices in our LFO system are redressed. For this Court to decline to do so after the Blazina decision would not only perpetuate the same injustices our high Court has just condemned but amount to a significant unfairness, rising to the level of a due process violation.

The Blazina decision represents a fundamental recognition by our highest court that the system under which appellant was ordered to pay LFOs is flawed and unjust. The concerns shared by all of the justices on the Supreme Court in Blazina apply equally here as to the defendants in the two separate cases consolidated in Blazina. This Court should grant Mr. Perry the same relief as the defendants in Blazina and, in addition to the other remedies requested, should strike the LFO's and order reversal and remand for resentencing with orders for the trial court to give full and fair consideration to Mr. Perry's individual financial circumstances and

present and future ability to pay before imposition of any LFOs.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 17th day of August, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel via this court's portal upload at Pierce County Prosecutor's Office, pcpateecf@co.pierce.wa.us, and appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows: Mr. Stephane Perry, DOC 305186, WCC, PO Box 900, Shelton, WA. 99362.

DATED this 17th day of August, 2015.

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